

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN**

MALIBU MEDIA LLC,

Plaintiff,

-vs-

Case No. 13-C-536

**JOHN DOE subscriber assigned IP
Address 184.58.186.212,**

Defendant.

DECISION AND ORDER

The plaintiff, Malibu Media LLC, filed a notice of voluntary dismissal pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i), which provides that a plaintiff can dismiss an action without a court order by filing “a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment.” The effect of this notice is dismissal without prejudice. Fed. R. Civ. P. 41(a)(1)(B).

The defendant now moves to dismiss under Rule 41(b), arguing that the dismissal should be with prejudice due to Malibu Media’s contumacious and dilatory conduct in attempting to serve the complaint. The Court cannot decide this motion because the effect of a Rule 41(a)(1) motion is automatic. “If a defendant desires to prevent a plaintiff from voluntary dismissal under Rule 41(a)(1), it may do so by merely filing an answer or

motion for summary judgment. But ‘so long as the defendant elects to abstain from the decisive joining of issue’ by answer or motion for summary judgment, the plaintiff is still entitled to dismissal by notice as a matter of right.” *Merit Ins. Co. v. Leatherby Ins. Co.*, 581 F.2d 137, 143 (7th Cir. 1978).

Defendant’s motion to dismiss [ECF No. 43] is **DENIED**.

Dated at Milwaukee, Wisconsin, this 5th day of November, 2014.

BY THE COURT:



HON. RUDOLPH T. RANDA
U.S. District Judge